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Subject: Comments of Everest Midwest Licensee - CS Docket No. 01-290

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	
And Competition Act of 1992		)
	)	CS Docket No. 01-290
Development of Competition and Diversity	)	
In Video Programming Distribution:	)	
Section 628©(5) of the Communications Act	)	
	)	
Sunset of Exclusive Prohibitions	)	

COMMENTS OF EVEREST MIDWEST LICENSEE LLC. dba EVEREST CONNECTIONS CORPORATION

Everest Midwest Licensee, LLC. dba Everest Connections Corporation("Everest") is pleased to provide comments in the Commission's Notice of Proposed Rulemaking in this docket, issued on October 11, 2001. The issues surrounding exclusive programming are of great importance to Everest, a broadband service provider offering telecommunications, cable and high speed Internet service via cable modem in the Kansas City metropolitan area.

Everest began providing its facilities-based service to customers on January 25, 2001. In the ten and a half months since Everest began providing service, it has passed approximately 10,000 homes and has acquired nearly 3,000 customers.

Everest offers more than 290 channels of programming, including pay-per-view and digital music channels. However Everest has been unable to obtain video-on-demand and local sports programming because of exclusivity arrangements with Everest's competitor, Time Warner. Although Everest has not yet filed any complaints at the Commission, it is extremely likely that Everest will be filing such actions within the next few months if exclusivity issues cannot be resolved. Everest strongly believes that the prohibition on exclusive programming contracts contained in Section 628 ©(2)(D) of the Communications Act of 1934, as amended, should be extended beyond the October 5, 2002 sunset date. Extension of the sunset date is absolutely essential to preserve competition and diversity in the distribution of video programming.

BROADBAND SERVICE PROVIDERS WOULD BE HARMED IF THE SUNSET PROVISIONS OF SEC. 628 © (2) (D) ARE LIFTED

Despite the best intentions of the Cable Act of 1992 and the Telecommunications Act of 1996, terrestrial competitors to incumbent cable companies and facilities-based competitors to incumbent local exchange companies, providing service to residential customers have been very slow to develop. At the time that the Telecommunications Act of 1996 was passed, it was thought that cable companies would enter the telephony market and incumbent telecommunications companies would offer "video dial tone," in competition with incumbent cable companies. Now, almost six years after the 1996 Act was passed it does not appear that either incumbent cable or telecommunications companies will enter each others' markets.

It has only been within the past couple of years that Broadband Service Providers have emerged to provide a facilities-based alternative to incumbents, offering telecommunications, cable and high speed Internet services over a separate pipe to the home. Several commissioners, in recent speeches, have recognized that facilities-based competitors are the best hope for achieving the lofty goals of the 1996 Act, yet entering this business is extremely costly from a capital perspective and fraught with numerous challenges, that ranging from attempting to obtain franchises from cities without burdensome restrictions to dealing with incumbent monopolists, who do everything in their power to thwart market entry.

Yet it is the possibility of offering multiple services to residential customers that makes the last mile build an economically viable proposition. The average monthly revenue for Everest customers, exclusive of long distance and pay-per-view is $86. With long distance and pay-per-view, average monthly revenue is $106 per month. It is this type of revenue, coupled with a 30% penetration rate, that supports a viable business plan for a last-mile build. However, in order to attract the percentage of customers that supports a cable alternative to incumbents, it is essential that competitive start-ups, such as Everest, be able to offer programming that is comparable to that being offered by the large MSOs.

BROADBAND SERVICE PROVIDERS MUST HAVE ACCESS TO LOCAL SPORTS PROGRAMMING PRODUCED BY INCUMBENT CABLE PROVIDERS

In Kansas City, the incumbent cable company, Kansas City Cable Partners, dba Time Warner, operates Metro Sports, a channel that covers primarily selected high school sports, but also regional college sporting events of great interest to area subscribers. One game of particular interest to area fans and Everest subscribers was the annual gridiron contest between the University of Kansas and Kansas State University, played on

Saturday, October 27, 2001.

On Monday, October 22, 2001, Everest received inquiries from several customers concerning whether Everest would be offering the KU-K-State football game on pay-per-view. On Tuesday, October 23, 2001, a news item appeared on the official website of Kansas State University announcing that cable subscribers served by Time Warner and Comcast in Kansas City as well as those served by Sunflower Cable in Lawrence, KS and those served by Cox Communications in 59 Kansas communities, including Topeka and Wichita, could order the game as a pay-per-view telecast by calling their cable provider. The game was being produced by Time Warner's affiliate, Metro Sports, and was being transmitted by satellite to Time Warner, Cox, Comcast and Sunflower.

Despite repeated attempts, Everest was not successful in contacting anyone at Metro Sports until Wednesday, October 24, 2001. Everest was then told by Metro Sports that the president of Kansas City Cable Partners would have to be contacted to get approval to offer the KU-K-State game to Everest. Finally, after attempting to obtain an answer from Metro Sports on Thursday, Everest received a voice mail around 10:30 a.m. Friday, October 26, 2001, indicating that the President of Time Warner's Kansas City operation had decided Everest would be permitted to offer the game. However, Metro Sports only provided a test signal to Everest for one hour, from 4-5 p.m. Friday. Everest was unable to receive the signal at that time. Metro Sports put up a test signal again one hour before the game. Everest's head end technicians tried again to pick up the signal, but were unsuccessful. Everest was not able to offer the game to its subscribers.

It is our understanding that technical difficulties were experienced by other cable operators who attempted to receive the KU- K-State game. Hence, Everest cannot conclude with certainty that it was given incorrect coordinates. But it was totally unacceptable to wait until 28 hours before the game to learn whether Everest would be able to offer the KU-K-State game to its customers, when all other operators offering the game were given at least six days notice, if not more. It would have been discriminatory and certainly would have been in violation of Section 628, if Time Warner had determined that Metro Sports could not offer its satellite-transmitted sports programming to Everest. Time Warner's delay in deciding whether Everest could receive the game contributed to the fact that Everest customers were ultimately unable to receive the game on pay-per-view.

While this represents just one example of discrimination against Everest, the broader concern is that the Metro Sports channel is simply not available to Everest, but is available to Comcast, via a terrestrial interconnection arrangement. Comcast serves Olathe, Kansas and several communities in the Missouri suburbs of Kansas City. Everest believes that the exclusivity prohibitions contained in Sec. 628 (b) should be expanded to include terrestrial transmissions of programming. Everest believes it is patently discriminatory for Time Warner to offer programming to Comcast, but not to Everest, simply because Comcast does not compete with Time Warner.

EVEREST IS EXTREMELY CONCERNED ABOUT THE POTENTIAL SUNSET OF THE EXCLUSIVITY RULES CONSIDERING ITS DIFFICULTIES IN OBTAINING VIDEO-ON-DEMAND SERVICES

Everest originally signed a contract with Demand Video to provide video-on-demand service. In April 2001, Demand Video, went bankrupt. Everest's efforts to obtain a replacement video on demand provider have, so far, been unfruitful. Everest has been turned down by iN DEMAND and Diva. Both indicate they are owned, in part, by Time Warner and Comcast and therefore are unable to provide service to competitive multi-channel video programming distributors. Everest is not aware that either entity has either applied for or received a determination that this exclusivity arrangement is in the public interest. While video-on-demand is still cutting edge technology and requires end-users desiring this service to have special reception equipment, this service will no doubt become standard fare for cable subscribers. Multi-channel video programming distributors who do not have access to video-on-demand will not be able to offer a comparable package of services to those providers who are able to offer video-on-demand. This is yet another reason why the exclusivity prohibitions contained in Section 628 should be extended beyond next year's proposed sunset date.

EXCLUSIVITY ISSUES ARE PROBLEMATIC EVEN WHEN THERE IS NO VERTICAL INTEGRATION BETWEEN PROGRAMMERS AND CABLE COMPANIES

Everest is currently involved in a dispute with Goodlife TV, a programmer, who, does not appear to have any vertical ownership ties to Time Warner. In September 2000, Everest signed a contract with OlympuSAT, a satellite programming distributor, to obtain the Goodlife TV channel. Yet, late in 2000, Goodlife TV called Kansas City Cable Partners, the Kansas City Time Warner affiliate, and offered KCCP exclusive rights to carry Goodlife TV in Lenexa, KS, where Everest was scheduled to turn up service, and as previously stated, did turn up service in January 2001. Time Warner began offering Goodlife TV in March 2001. In November 2001, Goodlife TV removed its programming from OlympuSAT, and did not offer Everest an alternative means of picking up Goodlife

TV, thus terminating Everest's ability to carry that channel. While Everest does not object to Time Warner carrying Goodlife TV, Everest believes that it was improper and illegal for Goodlife TV to terminate its ability to carry their programming.

THE EXCLUSIVITY PROHIBITIONS CONTAINED IN SEC. 628 © (2)(D) SHOULD REMAIN IN EFFECT

The Commission has asked commenters to respond on whether it should consider an approach that narrows the scope of, rather than completely eliminates the exclusivity restriction. First, Everest does not believe the exclusivity restriction should be eliminated. Everest believes that it would be extremely difficult and very subjective for the Commission to attempt to preserve the exclusivity rules for only certain "essential" programming services. How would the Commission determine which programming services were essential? While some subscribers might not regard sports programming as essential, for others, it is the only reason that they subscribe to cable service. Everest believes that the limitation of exclusivity should not be tied to specific geographic or competitive circumstances of the area in question. By way of the Goodlife TV example *supra*, Everest believes that the issue of vertical integration is just one factor the commission should consider when evaluating exclusivity.

Everest believes that the exclusivity restriction should continue to be applied when the programming service in question is vertically integrated with cable television systems in some locations but is not vertically integrated with those in the area where exclusivity might be sought. One example of this in the Kansas City area is where Metro Sports offers programming to Comcast, but not to Everest. Although there is no vertical integration between Comcast and Metro Sports, there still is an exclusivity, which has an anticompetitive effect in those communities where Metro Sports is unavailable to Everest.

Everest also believes it would be inappropriate to lift the prohibition for MVPD competitors of who have a sufficient "competitive presence." If, for example, competitive presence was defined as having a market share of 30%, a company, such as Everest may have a market share of 30% in one municipality, but may have only a small market share in the rest of the city. Everest simply cannot afford to engage in local origination programming, sports or otherwise, when it has 3,000 customers in its customer base versus its competitor, who has more than 314,000 customers in the Kansas City area.

Everest believes that the most prudent action for the Commission to take is to extend the sunset period for Sec. 628 ©(2)(D) at least until January 1, 2006, when the existing prohibition on exclusive retransmission consent agreements between television broadcast stations and MVPDs expires. Prior to the new January 1, 2006 sunset date, the Commission should undertake the same analysis it is conducting now. At that time the Commission will be in a better position to assess whether there is meaningful competition between terrestrial cable providers justifying elimination of the prohibition on exclusive programming contracts.

CONCLUSION

Everest strongly urges the Commission to extend the sunset date of the exclusivity prohibition until January 1, 2006. This prohibition continues to be necessary to preserve competition and diversity in the distribution of video programming. Prior to lifting restrictions at that time, Everest urges the Commission to undertake an analysis similar to that being conducted in this docket. Although the Commission may wish to limit the prohibition on exclusive contracts, any such limitation is premature at this time and would only serve to harm fledgling facilities-based broadband service providers. It is broadband service providers such as Everest, who appear to be the best long-term alternative to provide competition to incumbents for telecommunications, cable and high speed Internet service. Start-up competitors who are able to shoulder the very expensive proposition of building new last mile facilities to residential customers must be able to deliver content products that are comparable to those being offered by incumbents. Extending the sunset date for the exclusivity prohibition is one way to ensure that these newly emerging alternatives to incumbent cable operators have a chance to provide service on a level playing field.

Respectfully submitted,

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